

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
1998 Biennial Review – Part 76)
Cable Television Service Pleading)
And Complaint Rules)
_____)

CS Docket No. 98-54

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Ameritech New Media, Inc.
Comments in Support of
Petition for Reconsideration**

Ameritech New Media, Inc. ("Ameritech") respectfully files these comments in support of EchoStar Communications Corporation's ("EchoStar") petition for reconsideration of the Commission's report and order in the above-referenced proceeding.¹ Ameritech agrees with EchoStar that the *Report and Order* implements significant and substantive changes to the statutes of limitation applicable to Part 76 cable television service complaints (including program access, program carriage, and open video system complaints) without adequate notice or opportunity to comment, in violation of section 533(b) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b). Ameritech therefore supports EchoStar's position that the amendments to the statutes of limitation adopted in the *Report and Order* must be set aside pending a proper notice and comment rulemaking proceeding to consider such amendments.

Prior to the *Report and Order*, a party alleging a violation of the program access, program carriage or open video system rules was permitted to file a complaint within one

¹ 1998 Biennial Review – Part 76 Cable Television Service Pleading and Complaint Rules, Report and Order, CS Docket No. 98-54, FCC 98-348 (rel. Jan. 8, 1999) (*Report and Order*).

year of the date on which, among other things, the defendant offered to sell or carry programming on terms that violated the rules. For example, the statute of limitations for program access complaints permitted a complaint to be filed within one year of the date on which the defendant “offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate one or more rules contained in this subpart.”² The *Report and Order* amends the foregoing provision by adding the further limitation that “such offer to sell programming is unrelated to any existing contract between the complainant and the satellite cable programming or satellite broadcast programming vendor.”³

The Commission specifically acknowledges that the foregoing amendment was not addressed in the *Notice*.⁴ Moreover, none of the comments received in response to the *Notice* made any reference to the statute of limitations. Rather, the amendment was adopted in response to an unrelated Bureau decision interpreting the program access complaint rules, which was released almost four months after the record in this proceeding closed.⁵ The Commission, nevertheless, attempts to minimize its failure to

² 47 C.F.R. § 76.1003(r)(2) (1997). The program carriage and open video system complaint statutes of limitation were virtually identical. See 47 C.F.R. §§ 76.1302(r)(2), 76.1513(r)(2) (1997).

³ 47 C.F.R. § 76.1003(f)(2), *Report and Order*, Appendix A. The *Report and Order* makes corresponding changes to the program carriage and open video system complaint rules. See 47 C.F.R. §§ 76.1302(e)(2) and 76.1513(g)(2), *Report and Order*, Appendix A.

⁴ 1998 Biennial Review – Part 76 Cable Television Service Pleading and Complaint Rules, Notice of Proposed Rulemaking, CS Docket No. 98-54, 13 FCC Rcd 10644 (1998) (*Notice*).

⁵ *Report and Order*, FCC 98-348 at para. 18 (“The impetus for th[ese] amendment[s] is the Bureau’s recent decision dismissing as time-barred a program access complaint on the grounds that the defendant’s offer to renegotiate dealt with an allegedly discriminatory contract that had been in effect for more than one year.”) (citing *EchoStar Communications Corp. v. Fox Liberty Networks, et al.*, Memorandum Opinion and Order, File No. CSR-5138-P, 13 FCC Rcd 21841 (CSB 1998) (*EchoStar*)). Ameritech notes that the *Echostar* decision is the subject of a petition for reconsideration filed by Echostar on November 27, 1998, which is still pending.

seek comment on the amended rules by asserting that the foregoing change is merely a “procedural amendment” that “clarif[ies] essentially similar provisions related to the one-year limitations period” for filing Part 76 cable television service complaints.⁶

The foregoing amendment, however, is not merely “procedural,” nor is it merely a “clarification” of the existing one-year limitations periods for filing Part 76 complaints.⁷ To the contrary, it establishes a significant new restriction on program access complaints by multichannel video programming distributors (MVPDs) that have existing contracts with programming vendors. In particular, it limits the events that can trigger program access review from all offers to sell programming to those that are unrelated to any existing contract between the parties.

The Commission’s adoption of this substantive amendment violates section 533(b) of the APA, which requires the Commission to give notice of “either the terms or the substance of the proposed rule or a description of the subjects and issues involved.”⁸ In the *Notice*, the Commission gave interested parties no indication that it was contemplating such an amendment. To the contrary, the Commission stated simply that it was proposing to “simplif[y] . . . the complaint processes for Part 76 rules by instituting a

⁶ *Id.* at para. 18.

⁷ Even if the Commission has authority to promulgate without notice and comment a “procedural” rule that codifies the Cable Bureau’s interpretation of the existing statute of limitation applicable to program access complaints, it does not have authority to summarily adopt a substantive rule that clearly exceeds the Bureau’s interpretation. Ameritech notes in this regard that the referenced Bureau decision held that, after the limitations period for challenging a discriminatory programming contract has expired, the parties may renegotiate the terms of the contract, and that doing so “will not subject such contracts once again to program access review *unless* they enter into a new contract.” *EchoStar*, 13 FCC Rcd at 21849 (emphasis added). In contrast, the amendment adopted by the Commission appears to preclude program access review of an offer to sell programming that is in any way related to an existing programming contract once the one year limitations period for reviewing that contract has elapsed. See 47 C.F.R. § 76.1003(f)(2). This limitation is significantly broader than the Bureau’s holding in *EchoStar*.

⁸ 5 U.S.C. § 533(b).

uniform system” of procedural rules.⁹ Because the three statutes of limitation amended by the Commission were already substantively the same, the public could not reasonably have anticipated that the Commission was contemplating the changes it made. For this reason, no one commented on the statutes of limitation the Commission amended, clearly demonstrating that notice was inadequate.¹⁰ The Commission, therefore, plainly failed to provide interested parties notice sufficient to afford them a reasonable opportunity to participate in the rulemaking process, as required by section 533(b) of the APA.

As Echostar aptly observes, the amendments to the Part 76 complaint statutes of limitation also fail to constitute a “logical outgrowth” of the proposals in the *Notice*. For a rule to constitute a “logical outgrowth” of an agency proposal, the rule must be sufficiently related to the proposal that a party “should have anticipated that such a requirement might be imposed.”¹¹ Because the three statutes of limitation in Part 76 were virtually identical, no one could reasonably have foreseen that the Commission might amend them in a proceeding intended to harmonize inconsistent procedural provisions,¹² let alone amend them in the manner it did. As such, the amendments do not satisfy the “logical outgrowth” standard.

⁹ *Notice*, 13 FCC Rcd at 10645.

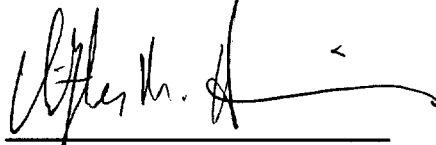
¹⁰ See *Shell Oil Co. v. EPA*, 950 F.2d 741, 761 (D.C. Cir. 1991) (stating that the EPA’s “fail[ure] to identify even one comment recommending (or opposing)” its proposal “reinforce[s] our conclusion that notice was inadequate”).

¹¹ *Provision of Aeronautical Services via the Inmarsat System, et al.*, Order on Reconsideration and Further Notice of Proposed Rulemaking, File No. CSS 86-005-M(2), *et al.*, 11 FCC Rcd 5330, 5332 (1996) (quoting *Small Ref. Lead Phase Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 549 (D.C. Cir. 1983)).

¹² *Id.* at 10644 (“we seek comment or [sic] ways to simplify and make more uniform our Part 76 Cable Television Service pleading and complaint process rules”).

Based on the foregoing, the Commission must rescind its amendments to the Part 76 complaint statutes of limitation adopted in the *Report and Order*, and issue a new notice soliciting comment on the proposed amendments as required by the APA.

Respectfully submitted

A handwritten signature in black ink, appearing to read "Chris M. Heimann", with a long horizontal flourish extending to the right.

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April 16, 1999

CERTIFICATE OF SERVICE

I, Anisa A. Latif, do hereby certify that a copy of Ameritech New Media, Inc. Comments in Support of Petition for Reconsideration has been served on the parties below via first class mail – postage prepaid on this 16th day of April 1999.

By


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